Supreme Court of the United States

October Term, 1940

No. 559

MAUD S. WILLIAMS,

Petitioner,

against

NEW JERSEY-NEW YORK TRANSIT COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support of Petition

BREED, ABBOTT & MORGAN,
Counsel for Petitioner,
By CHARLES H. TUTTLE.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

Plaintiff obtained a judgment of the United States District Court for the Southern District of New York awarding her damages in the sum of $7,373.41. The case was tried before Judge COXE and a jury. The Circuit Court of Appeals reversed the judgment and dismissed the complaint (113 Fed. [2d] 649).

The action was to recover damages for severe personal injuries sustained by the plaintiff when hit on the head by a heavy briefcase or valise which fell from a baggage rack in the defendant's bus.

The defendant was an interstate common carrier. The accident happened in New Jersey. The plaintiff was on a trip in the bus from New Jersey to New York.

It was established by the defendant's own proofs and exhibits (see photographs, Defendant's Exhibits B and C, and photoprint, Defendant's Exhibit H, pp. 299, 301, 303) that this baggage rack was constructed of slender metal bars with spaces two and one-half inches wide between the longitudinal bars at the bottom of the baggage rack and a space of three and one-quarter inches between the two longitudinal bars at the side of the baggage rack. It was shown that the rack was completely unprotected by wire netting or other guard to prevent baggage falling from between the bars or over the edge as the moving bus swayed and joggled.

At the defendant's own request both the bus and the baggage rack were physically examined by the Court and by the jury (596-7).

The complaint charged that this flimsy baggage rack with wide spaces between its bars and without guards to prevent baggage from falling was unsuitable and imprudent, and that the operation of the bus with the likelihood of baggage becoming dislodged under these conditions constituted negligence (18-22). The defendant's answer admitted (26-7):

> "Defendant had and reserved to itself control of all parts of said bus and particularly the baggage racks which were used in common by all the passengers."

The trial court adopted and charged verbatim every one of the defendant's requests to charge (876-880). Indeed, the issue left by the court to the jury was put by the court in the very language of the defendant's third request to charge (858); and, in expanding thereon, the court instructed that the following was the factual issue (877-9):

"The question is a question of negligence, and negligence is the failure to use reasonable care; and the standard, which I have not stated, but I assumed it was known to every member of the jury, is that of what a reasonable person in similar or like circumstances would do. * * * The question is naturally whether in the exercise of reasonable care anything in connection with this baggage rack could reasonably be anticipated by the defendant in this case, or was reasonably anticipated or should have been reasonably anticipated.

Mr. Land: The question of foreseeableness.

The Court: Yes. I will also charge—well, it is the same thing. I had not seen this language. It is probably much better than I have used.

'This whole case must be considered in the light of what might reasonably have been foreseen before the alleged incident, and not from the standpoint of what anyone might consider should have been done or might have been done after the event.'

All that means is that you should apply this standard of care of this reasonably prudent person which we sometimes describe in a frivolous way as perhaps a mythical person. In other words, you should use that standard of the reasonably prudent person in similar or like circumstances."

The Trial Court also left it to the jury to say whether or not the accident was due to the fact that the owner of the brief case ~~had~~ "placed it improperly" in the rack. The jury's verdict must be taken as finding that it had not been improperly placed.

There was no evidence from either side as to whether or not this type of rack was in common use by bus companies in New Jersey.

The Circuit Court of Appeals reversed and dismissed the complaint. The Circuit Court of Appeals conceded:

"The bus had been swerving and twisting so violently that the plaintiff had been several times thrown against her fellow passengers; and a jury might properly have found that this caused the brief case to fall."

But the Circuit Court of Appeals rejected the principle of foreseeability on which the trial court had based its aforesaid charge to the jury. It held that the New Jersey law applied; it cited certain New Jersey decisions; and then it concluded as follows:

> "From these decisions we do not see how we can avoid concluding that in New Jersey a passenger in order to recover because of a defect in the equipment of a common carrier—though not because of a defect in its operation—must show that the carrier diverged from some standard which has been in general use in equipment of the kind or at least that the construction is unusual. When the evidence leaves both issues at large, the carrier apparently may provide what it thinks best, and a jury is not allowed to fix another standard."

Reasons Relied Upon for the Allowance of the Writ

This case presents matters of great and general public importance relating to the obligations of common carriers (particularly bus companies) engaged in interstate commerce, with respect to the standard of care and foresight required of them in the adoption of devices and appliances in their vehicles and offered to the public for its use.

Unless the decision of the Circuit Court of Appeals is reversed, the gravest public consequences will attach. The result will be to establish the lowest possible standard of care for common carriers.

The bases for the present application are:

(a) The decision of the Circuit Court of Appeals is erroneous.

(b) It completely misconstrues and misreads the decisions of the New Jersey courts.

(c) It is in direct conflict with the decisions of the highest courts of the State of New Jersey.

(d) It is in direct conflict with decisions of the United States Supreme Court.

(e) It establishes a discriminatory rule in favor of common interstate carriers and fixes a lower standard of liability for them than for private individuals. It annuls the common carrier's familiar obligation and the public policy out of which that obligation has grown, and does so in a case where the carrier itself by its own affirmative act created the conditions of danger inside of its own bus under its own exclusive control.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the said decree of the United States District Court for the Southern District of New York be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, Nov. 7, 1940.

Respectfully submitted,

MAUD S. WILLIAMS,
Petitioner.

BREED, ABBOTT & MORGAN,
Counsel for Petitioner.

By CHARLES H. TUTTLE,
15 Broad Street,
New York City.

BRIEF IN SUPPORT OF PETITION

POINT I

We submit that it is not the law in New Jersey or anywhere else that common carriers, by their own general use of a given device, can conclusively set their own standard of care, or that, in the absence of proof that there is such a device in general use, "the carrier may provide what it thinks best" and thereby conclude both court and jury.

Such holding, we submit, violates all the principles of public policy which have guided the courts in the exposition of the standards of care and foresight required of common carriers. It substitutes for the usual requirement of the highest degree of care the lowest conceivable minimum, to wit, what common carriers may generally choose to provide or, if there be no proof of that, then whatever the individual carrier may choose to provide.

The opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d) 649:

We had assumed, until this decision was made, that all American courts, unless otherwise compelled by statute, recognized the law as thus stated in *Alabama Great Southern R. Co.* v. *Alsup,* 101 F. (2d) 175:

> "It is well settled that a railroad, while not an absolute insurer, owes the highest duty to provide for the safety of its passengers, including safe means of leaving the train."

Certainly also we had assumed that such indisputably was the New Jersey law, since in *Holda* v. *Public Service*

Coordinated Transport, 11 N. J. Misc. 879, where a passenger in a motor bus was injured by a suitcase, the court said:

> "The defendant company being a common carrier of passengers was bound to use a high degree of care to protect the plaintiff from danger that foresight could anticipate."

Indeed, we would have assumed that the New Jersey decisions in *Rapp* v. *Butler-Newark Bus Line, Inc.*, 103 N. J. L. 512, and *Mumma* v. *Easton & A. R. Co.*, 73 N. J. L. 653 (more fully discussed hereafter) would have justified application of the doctrine *res ipsa loquitur*.

But the trial court, in charging the jury, did not go so far. It accepted the somewhat lower standard suggested in the defendant's own third request to charge (858), to wit, "what might reasonably have been foreseen before the alleged incident." It left to the jury to say whether in view of the construction of the rack and (to use the language of the Circuit Court of Appeals) the inevitable "swerving and twisting" of the bus in operation, the falling of heavy baggage placed in such a rack "might reasonably have been foreseen" "or should have been reasonably anticipated" by a "reasonably prudent person."

Compare with this very mild (—too mild, perhaps—) requirement as to the standard of care and foresight charged by the trial court with the Circuit Court of Appeals' complete nullification of the whole doctrine of reasonable anticipation, foreseeability and common prudence, and its substitution of the startling doctrine that, in the absence of proof of the general use of some particular device, "the carrier apparently may provide what it thinks best."

The decision of the Circuit Court of Appeals amounts to a holding that in New Jersey the obligations of a common carrier are, in effect, in accordance with such minimum standard as they may care to set for themselves, or,

if they have not set any such standard for themselves, then such minimum standard as the individual carrier may set for itself.

In New Jersey thousands of persons are transported daily by interstate common carriers. Can it be that their only protection is what the common carrier "thinks best" to "provide"?

POINT II

The Circuit Court of Appeals has misread the New Jersey decisions, and its opinion is in conflict therewith and in conflict with the law as laid down in the Federal courts and as universally declared.

The New Jersey cases by which the Circuit Court of Appeals felt pushed into so extreme a ruling are:

Traphagen v. *Erie R. R.*, 73 N. J. L. 759;
Feil v. *West Jersey & Seashore Railroad Co.*, 77 N. J. L. 502;
Kingsley v. *Delaware, Lackawanna & Western R. R. Co.*, 81 N. J. L. 536;
Leech v. *Hudson & Manhattan Ry.* Co., 113 N. J. L. 366, affirmed on the opinion below, 115 N. J. L. 114;
Byron v. *Public Service Coordinated Transport*, 122 N. J. L. 451;
Hansbury v. *Hudson & Manhattan Ry. Co.*, 13 Atl. Rep. (2) 216. (124 NJL 502,

In the first place, there is no factual parallel between those cases and the present case. In all those cases the direct cause of the accident was the passenger's own act, such as stepping down a step on a platform or a car or

stepping between a step and a platform. The plaintiff's claim in those cases was that the step or platform was not so constructed as adequately to guard the passenger against such action by himself. The courts merely held that where such construction was not obviously dangerous in itself and (in the language of the *Traphagen* case, p. 761) could not be said not to "afford reasonable means for alighting" or not to show the "use of careful judgment in the method of construction", the plaintiff could not recover merely by asking the jury to find that the common carrier was bound to provide some other method of construction, particularly in the absence of proof that other accidents had previously occurred in the same manner.

Here the factual situation was altogether different. No act of the plaintiff contributed to her own injury. The object which fell was not hers and had not been placed in the rack by her. She was merely occupying a seat to which she had been invited by the defendant and for which she had paid. The bus was not standing still at the time. The jury found that the brief case had not been "placed improperly by its owner."

We adopt the description of the accident as given by the Circuit Court of Appeals itself:

> "She boarded the bus at Union City, New Jersey, and sat down in the second seat on the right-hand side of the aisle; a fellow passenger was beside her, nearer the window. Shortly after she was seated, he arose from his seat and put a brief case, which he had been holding in his lap, in the baggage rack overhead. After the bus had gone about a mile, this fell down and struck the plaintiff on the right side of her head, causing the injuries for which she sued. The bus had been swerving and twisting so violently that the plaintiff had been several times thrown against her fellow passenger; and a jury might properly have found that this caused the brief case to fall."

The testimony of the defendant's own witness, William Barbour, who was a student driver on the bus at the time (707), is that the accident happened shortly "after we made the hairpin turn coming off the east boulevard" (708). To the same effect is the testimony of the defendant's witness Barry, driver of the bus, "—you are always turning corners" (680-684).

The jury would readily know that this swerving, twisting, swaying and joggling by the bus was a foreseeable if not a normal consequence of its operation in the metropolitan area. Frequent stops, more or less sudden, are rendered inevitable by traffic lights, pedestrians and other vehicles, and by the need of taking on and letting off passengers. There were certain to be sudden turns and changes in speed and direction.

Such forceful movements by the bus were clearly foreseeable by its owner and operator. Hence it was a clear question for the jury whether or not a rack of this particular character was reasonably adequate to prevent the falling of the miscellaneous objects, varying in size, shape and weight, which by the tender of the rack the defendant invited its passengers to place upon it over the heads of other passengers, and whether or not because of the character of this rack such falling was reasonably foreseeable by a prudent operator.

There was no evidence that the object which fell was not of a character or class which would normally be placed upon the rack; and the very happening of the accident showed that under the conditions of bus operation such an object could fall through bars so widely placed or over an edge so unguarded.

It is one thing when an accident is brought on by the passenger's own action, and the sole question is whether the carrier should have done more than it did to prevent such action by the passenger himself.

It is an altogether different thing when the passenger, passively sitting in a place designated by the carrier in

its own conveyance, is hit by an object which fell from a rack where the carrier invites all passengers to put baggage and which ordinarily would not have fallen if due care had been used in making the rack safe for the purpose.

The dangers of such falls are obvious and are created or made possible solely by the carrier's own act. Whether the carrier has, under such circumstances, taken due care to protect against such foreseeable dangers is a question of fact for a jury.

All that the above New Jersey decisions hold is summed up in the latest one cited by the Circuit Court of Appeals, to wit, *Hansbury* v. *Hudson & M. Ry. Co.*, 124 N. J. L. 502, 13 Atl. (2d) 216 (1940). There the alighting passenger stepped into a space between the standing car and the platform. The Court affirmed the non-suit, saying:

> "There being no evidence of any negligence in the construction of either the car or the platform, it is evident that it violated no duty owed to the plaintiff. * * * The fact that a space existed between the car of the defendant's train and the station platform was no evidence of negligence, in the absence of proof of improper construction of either the platform or the car."

But such cases have no bearing at all upon a situation where a carrier invites a passenger to sit in a seat under a rack upon which it invites other passengers to place heavy objects and over which it has the right and duty of control. In such a case the carrier by its own affirmative action places upon itself an affirmative duty to use "the highest" or "a high" (or at least "a reasonable") degree of care to prevent the foreseeable ways by which the obvious dangers which it itself has thus created through the placing of overhanging objects may result in injuries to its passengers.

The rule invariably applied to such a situation by the Courts of New Jersey is thus stated in *Rapp* v. *Butler-*

Newark Bus Line, Inc., 103 N. J. L. 512, 138 Atl. 377, on the authority of *Mumma* v. *Easton & A. R. Co.*, 73 N. J. L. 653, 65 Atl. 208:

> "When through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care."

In this *Rapp* case the injuries to the plaintiff passenger were the result of the coming loose of the right rear wheel of the bus from the axle to which it had been attached, thus permitting the axle to go through the side of the bus and strike the plaintiff. The Supreme Court of New Jersey unanimously affirmed a judgment for the plaintiff saying (in addition to quoting the above from the *Mumma* case):

> "It is a matter of common knowledge that a jitney bus, when run with due care and kept in proper condition, will carry its passengers safely; and, when the plaintiff, being a passenger, has proved the reception of injuries through the happening of an accident which would not have occurred except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injuries were caused without his fault. *Bergen County Traction Co.* v. *Demarest*, 62 N. J. Law 755, 758, 42 A. 7279, 72 Am. St. Rep. 685."

A unanimous decision by the New Jersey Court of Errors and Appeals directly in point is *Gore* v. *D. L. & W. RR. Co.*, 89 N. J. L. 224. There the defendant's train was stopped at such a place that when the plaintiff alighted she did not step down on the station platform but on a roadway paved with rough Belgian blocks. As a result she

tripped and fell. In reversing a judgment of nonsuit the Court of Errors and Appeals said (p. 226):

> "This, it seems to us, is the situation presented by the plaintiff's testimony from which a jury might infer an invitation to leave the train under conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom."

This principle is directly applicable to the present case. Here the defendant invited the plaintiff to sit under this rack and impliedly assured her that she could safely do so. The defendant also invited other passengers to place their baggage and bundles on the rack. Thereby the defendant itself created and set in motion (to quote the *Gore* case) a chain of "conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom".

We believe that it was on this decision that the Trial Court based its instruction to the jury. Certainly that decision represents the universally understood rule where conditions of danger to its passengers are set in motion or created by the acts of the carrier itself.

In *Hansen* v. *North Jersey St. Rwy Co.*, 64 N. J. L. 686, 46 Atl. 718, the Court of Errors and Appeals of New Jersey considered a case where the plaintiff was injured by reason of over-crowding on a trolley car about the point of exit. The Court held that since the conditions about the point of exit were under the carrier's control, the carrier was bound by the following rules thus stated in the headnotes in the Atlantic Reporter:

> "1. A common carrier of passengers must use a high degree of care to protect them from dangers that foresight can anticipate.

2. By 'foresight' is meant, not fore-knowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but, rather, that the characteristics of the accident are such that it can be classified among events that without due care are likely to occur, and that due care would prevent.

3. The crowding of a trolley car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate and employ care to avert."

In *Barney* v. *Hudson & M. R. Co.*, 145 Atl. 5, at page 6, (105 NJL 274,
the Court said:

"Now, the rule is that when a passenger in the charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, then the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised. Whalen *v.* Consolidated Traction Co., 61 N. J. Law, 606, 40 A. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; McPherson *v.* Hudson, etc., R. Co., 101 N. J. Law, 410, 128 A 231."

In *Scott* v. *Bergen County Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060, affirmed on opinion below, 48 Atl. 1118, the Court said:

"The railroad company was a common carrier of passengers, and as such it and its employees owe to the passengers a high degree of care for the safety of the passengers, and they are bound to exercise a high degree of care to get them safely to the journey's end."

In *Wall* v. *G. R. Wood, Inc.*, 119 N. J. L. 442, 197 Atl. 41, the Court of Errors and Appeals of New Jersey said:

"The care due from a common carrier and its servants toward passengers in their charge is a high

degree of care. *Whalen* v. *Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645."

A leading case in another jurisdiction directly applicable is *Rosenthal* v. *N. Y., N. H. & H. R. R. Co.*, 88 Conn. 65. There the plaintiff was playing cards while seated in the smoking car of a train running from New York to Hartford and was *injured by a suitcase falling from the rack above his seat.* The Court held that the doctrine of *res ipsa loquitur* governed the situation and stated:

> "The furnishing of racks for that purpose *invites* passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath such racks."

In New York the leading case is *Bressler* v. *N. Y. Rapid Transit Corp.*, 277 N. Y. 200. There the plaintiff was a passenger in one of the defendant's subway trains. During the running of the train and while she was sitting quietly in her seat, a pane of glass broke or shattered destroying her sight in one eye. The Court of Appeals held that these facts alone and in themselves made out a *prima facie* case of negligence.

Hence, as we have already pointed out, the charge of the trial court to the jury was actually much more favorable to the defendant than it was entitled to, because it did not hold the defendant to the doctrine of *res ipsa loquitur,* or even to "the highest" or even "a high" degree of care, but rather adopted the request of the defendant itself for an instruction that its obligation was merely "what might reasonably have been foreseen."

POINT III

The decision of the Circuit Court of Appeals was contrary to the settled rule in the Federal courts.

The Federal rule is the familiar type thus stated in *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 175 (C. C. A. 9th Ct.):

> "As a common carrier of passengers, respondent is charged with the utmost skill, care and diligence consistent with its business."

In *Alabama Great Southern Railroad Co.* v. *Alsup*, 101 F. (2d) 175 (C. C. A. 5th Ct.) the Court said (p. 176):

> "It is well settled that a railroad, while not an absolute insurer, owes the highest duty to provide for the safety of its passengers."

In *Shoemaker* v. *Kingsbury*, 79 U. S. 369, this Court thus defined the standards of care which common carriers owe to their passengers (p. 376):

> "The latter (the common carriers) undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travellers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable."

Spokane & Inland Empire R. R. Co., 241 U. S. 344, involved a question as to whether openings in the buffers in certain railroad cars were safe and properly constructed. In holding that this question was one properly for the determination of the jury, the United States Supreme Court said (p. 351):

> "We think the court was clearly right in holding that the question was not one for experts and that the jury after hearing the testimony and inspecting the openings were competent to determine the issue."

CONCLUSION

For the foregoing reasons we respectfully submit that a writ of certiorari should be granted.

Dated November 7, 1940.

Respectfully submitted,

CHARLES H. TUTTLE,
Of Counsel.

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9–0157-8

Supreme Court of the United States

October Term, 1940

No. 552...

MAUD S. WILLIAMS,

Petitioner,

against

NEW JERSEY-NEW YORK TRANSIT COMPANY.

Brief in Opposition to Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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STATUTE:

U. S. Supreme Court, Rule 38b 2

Supreme Court of the United States

October Term, 1940

No.....

MAUD S. WILLIAMS,

Petitioner,

against

NEW JERSEY-NEW YORK TRANSIT COMPANY.

Brief in Opposition to Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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Facts

The facts in this case are succinctly stated in the unanimous opinion of the Circuit Court of Appeals of the Second Circuit rendered by Learned Hand, J., and reported at 113 Fed. (2d), page 649.

The plaintiff, a passenger in the defendant's bus, claims to have been injured by a briefcase which fell from a baggage rack and struck her. Her sole claim of negligence was predicated upon the wholly unsupported claim that the baggage rack was negligently constructed. The proof shows that the plaintiff boarded the defendant's bus in New Jersey (R. 21). A fellow passenger placed a brief-

case in a baggage rack after plaintiff had taken her seat in the bus (R. 23). No claim was advanced that the driver of the bus saw the briefcase placed in the rack. While still in New Jersey and approximately one mile past the place where the plaintiff had boarded the bus the bag is claimed to have fallen.

The jury was permitted to view the bus. During the mile run the bus swayed from side to side but not sufficiently to dislodge any passenger from his seat or to require anyone to call the driver's attention to it. The case was submitted by the trial court to the jury solely on the question of whether the baggage rack was properly constructed, to all of which the plaintiff made no objection. The defendant contended that the case should not have been submitted to the jury but that under New Jersey law the plaintiff had failed to make out a cause of action in negligence.

Preliminary Statement

1. The incident above recited occurred in the State of New Jersey. The Circuit Court was therefore called upon to determine this case by considering and applying the New Jersey law.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 80.

Despite other arguments made in the petitioner's brief in support of the petition, the sole question properly presented on this application is whether or not the Circuit Court has decided a question of New Jersey law in a way probably in conflict with applicable New Jersey decisions (U. S. Supreme Court, Rule 38b). We respectfully maintain that the Circuit Court's decision is in accord with New Jersey law and, since we deem petitioner's citation of authorities other than New Jersey authorities irrelevant, we will refrain from commenting upon them.

POINT I

The Circuit Court's decision is in accord with New Jersey Law.

The record discloses that *without objection or exception by plaintiff's counsel,* this case was submitted to the jury on one single question, namely, was the baggage rack of the bus properly constructed. This appears from Judge Coxe's charge, wherein he stated:

> "In this case I am submitting to you as the sole question or sole issue of negligence whether the defendant was guilty of negligence in having a baggage rack in the condition that has been described during the testimony, and if so whether the injuries which the plaintiff is now suffering were caused by such negligence." (R. 287; see, also, R. 298, R. 283.)

The Circuit Court, in its opinion, at page 650, in reviewing the record stated as follows:

> "Both sides agree that the law of New Jersey measured the defendant's liability and it is apparent —although plaintiff disputes it—that the judge was right in leaving nothing to the jury but the construction of the rack."

The Circuit Court exhaustively reviewed the pertinent New Jersey decisions and came to the following conclusion:

> "In New Jersey a passenger in order to recover because of a defect in the equipment of a common carrier—though not because of a defect in its operation —must show that the carrier diverged from some standard which has been in general use in equipment of the kind *or at least that the construction is unusual."* (Italics ours.)

Concededly, the plaintiff offered not a scintilla of evidence either that the baggage rack departed from an accepted standard, that there was an accepted standard or that the construction was unusual.

All of the pertinent decisions on this question in the State of New Jersey have been painstakingly considered and reviewed by Judge Learned Hand in his opinion. No useful purpose can be served by us reviewing these decisions further here and we will content ourselves in quoting only from one of such cases, namely, the case of *Traphagen* v. *Erie Railroad Company*, 73 N. J. Law 759. In that case, a passenger caught her heel in the step of a railway car. It was claimed that the step was negligently constructed. The plaintiff failed to prove any departure from the usage of other railroads. At the close of the plaintiff's case, the trial judge ordered a nonsuit.

In sustaining the decision of the trial justice, the New Jersey Court of Errors and Appeals stated as follows, at pages 761-762:

> "We do not mean to say that a railroad company can construct the steps of its cars as it pleases. It must, of course, afford reasonable means for alighting and must use careful judgment in the method of construction it adopts, but when it appears, as in this case, that the steps are similar to those in common use, which must have proved sufficient for hundreds of passengers, and were actually sufficient for two passengers who alighted just before the plaintiff, *and when, also, there is a failure to prove any departure from the usage of other railroads,* we think there is no proof which would justify a jury in finding the defendant negligent. *To permit such a finding would practically substitute the judgment of a jury for the judgment of the railroad managers, the result would vary with each case, and subject the railroad to the danger of being found guilty of negligence no matter what plan it adopted.*" (Italics ours.)

In a concurring opinion, one of the judges stated as follows:

> "I shall vote to affirm the nonsuit in this case solely upon the ground that there was not sufficient proof to go to the jury upon the question of whether the car steps and the station platform were constructed in the ordinary way."

The foregoing case and all of the authorities cited by Judge Learned Hand in his opinion enunciate the rule that in the State of New Jersey a jury will not be permitted in the absence of affirmative evidence to speculate as to what is proper construction of equipment and to substitute its judgment for that of the public conveyance managers, and, to use the language of the Court of Errors and Appeals in New Jersey in the *Traphagen* case, *supra*, to "subject the railroad to the danger of being found guilty of negligence no matter what plan it adopted."

As indicated by the opinion of Learned Hand, J., in the conclusion of his opinion, at page 652, that is the rule in New Jersey, and it is a just rule, for, as Judge Learned Hand stated:

> "Today when public utilities are generally regulated by commissions of one sort or another, this may very well be a desirable rule; in any event it is not for us to change it."

We respectfully submit that since there was no proof in this case of any kind or nature to indicate that the baggage rack in question was constructed in any manner different from that used on other public conveyances, or that its construction was unusual, the Circuit Court of Appeals was correct in dismissing the plaintiff's complaint.

Petitioner's brief attempts to demonstrate that the determination of the Circuit Court is in conflict with New Jersey law, not by citing cases considering the questions

treated in the cases cited by the Circuit Court, but by quoting general language from cases considering other subject matter. These authorities are inapplicable, because

1. This case was not tried upon the theory considered in such cases, and such arguments should not be considered.

See: *Osgoodby* v. *Talmadge*, 45 Fed. (2d) 696 (C. C. A. 2nd);
U. S. v. *Johnson*, 98 Fed. (2d) 462 (C. C. A. 8th);
Virginian R. Co. v. *Mullins*, 271 U. S. 220, 227.

2. The Circuit Court, in its opinion at page 650, correctly disposed of these arguments by stating as follows:

> "Since, as we have said, the accident happened when the bus had gone only a mile beyond the place where the plaintiff boarded it, even though the other passenger had put the briefcase in the rack shortly after she had sat down, the interval was not long enough to charge the defendant with notice that it was stowed negligently, if in fact it was. There was no evidence that the driver actually saw it; nor was the evidence material that the bus swayed violently as it rounded the curves. The plaintiff did not indeed request any addition to the judge's charge. If therefore the plaintiff did not prove that the rack was negligently made, she could not recover."

The aforesaid conclusion reached by the Circuit Court was correct, as we will show in Point II hereof.

POINT II

Petitioner's authorities are inapplicable.

Petitioner's authorities are inapplicable either because petitioner's brief fails to disclose the full facts of the cases cited or because petitioner has quoted general language from cases without considering the facts of the particular cases.

An example of this is petitioner's reference (brief, p. 7) to the case of *Holda* v. *Public Service Co-ordinated Transport*, 11 N. J. Misc. 879, with the misleading statement that in that case "a passenger in a motor bus was injured by a suitcase." The passenger in that case was not injured by a suitcase but tripped over a suitcase which was sticking out in the aisle directly opposite the bus driver, who saw the suitcase being placed there and kept watching it from time to time. The statement quoted in petitioner's brief,—made by an intermediate Court of Appeals of the State of New Jersey,—was based upon the fact that the bus driver knew of the condition of the suitcase and did nothing to remedy it. That case, of course, has no application to our case, where it is conceded and the testimony of the plaintiff affirmatively shows that the bus driver did not see the briefcase being placed in the baggage rack, but that the briefcase was placed there by a fellow passenger in the view of the plaintiff without notice to the bus driver.

Similarly at pages 14-15 of the brief, petitioner quotes general language from cases with respect to the degree of care owed by a carrier to a passenger. This general language from these cases standing alone might be sufficient as a general statement of law but the question for determination is whether or not the rule applies in the case at bar and even if it does, which is not conceded, whether that care has been violated in the case at bar.

A reading of petitioner's cases will disclose that they do not consider situations where negligence is sought to be charged because of alleged defective appliances. The duty in such cases is clearly set forth by the Court of Errors and Appeals of the State of New Jersey in the case of *Feil* v. *West Jersey and Seashore Railroad Company*, 77 N. J. L. 502, 504, *supra*, as follows:

> "The duty of a railroad company to take care of the safety of its passengers, *so far as the furnishing of appliances is concerned*, is fully performed when those appliances are of standard character and in proper repair." (Italics ours.)

In *Traphagen* v. *Erie Railroad Company*, 73 N. J. Law 759, the court said:

> "* * * the railroad company is not bound to exercise an infallible judgment. It is guilty of no breach of duty if it selects an instrument in common use and approved by experience."

In *Kingsley* v. *Delaware, L. & W. Railroad Company*, 81 N. J. Law 536, *supra*, the Court of Errors and Appeals again reiterated this same rule and stated as follows at pages 544-545:

> "The case at bar, however, is devoid of even these elements of liability, and no attempt is made to establish defendant's liability upon the ground of notice or presumptive notice, but solely upon the ground that, because of the happening of the injury to the plaintiff, ex necessitate a mode of car construction which up to that period, and presumably since, has stood the test of use and experience may be singled out and condemned as a species of malconstruction, upon a basis of comparison which in the same breadth admits that there is no recognized standard of comparison, and hence no basis for the condemnation of the judgment as a tort-feasor.
>
> "In the final analysis, the testimony in the case at bar demonstrates simply a difference of construc-

> tion between the defendant's car and platform and some of the cars and platforms of other companies; but upon legal principle, *until that difference can be transmitted into a legal generalization indicating a variation from the existence of a standard type, the departure from which by the defendant might be construed as imprudent and negligent, and by which a criterion of duty may be established, the damage incurred under circumstances such as are presented in the case at bar must be held to be damnum sine injuria, and can impose no liability upon the defendant.*" (Italics ours.)

Finally in the case of *Hansbury* v. *Hudson & Manhattan Railway Co.* (Decided May, 1940), 124 N. J. L. 502, the court had before it a situation substantially identical with that in the *Kingsley* case, *supra.* In that case a passenger stepped into a space of 13 inches between the car and the platform. She argued that later cases have overruled the doctrine of the earlier decisions cited by us but the court concluded that this was not true and in affirming the nonsuit stated:

> "There being no evidence of any negligence in the construction of either the car or the platform, it is evident that it violated no duty owed to the plaintiff."

Even in cases where the standard of care urged by petitioner was recognized by the New Jersey courts, such courts have held, that the plaintiff has not satisfied its burden of proof by merely showing that an accident occurred.

See: *Meelhein* v. *Public Service Co-ordinated Transport,* 121 N. J. L. 163 (Court of Errors & Appeals, 1938);

Byron v. *Public Service Co-ordinated Transport,* 122 N. J. L. 451 (Supr. Ct., 1939).

In the *Meelhein* case, *supra*, the Court of Errors and Appeals in dismissing the complaint stated as follows:

> "Therefore, taking as true the stopping of a common carrier's motor bus on a steep grade, and from twelve to twenty inches from the curbing, without more, and giving thereto the benefit of all legitimate inferences deductible therefrom (Jones v. Public Service Railway Co., 86 N. J. L. 646; Fox v. Great Atlantic, &c., Co., 84 id. 726), we must determine whether or not same violated the defendant's duty of using a high degree of care for the safety of the plaintiffs, and of providing a reasonably safe place for them to alight, and we conclude that such proof standing alone, is insufficient to impose upon the defendant the burden of going forward, and therefore, the ruling of the trial court is affirmed."

In the *Byron* case, *supra*, the court after discussing the standard of care urged by petitioner, and, in dismissing the plaintiff's complaint, stated as follows:

> "The onus was upon Byron to establish by evidence that the car construction in the respects complained of was not in conformity with the common standard governing well regulated common carriers employing like means of transportation. There must be proof of a breach of the duty thus owing to the passenger. The carrier is not an insurer of his safety. The case is obviously not one of a negligent performance of an assumed duty of protection—'of furnishing guard rails on trolley cars,' as alleged in the amended complaint."

When we read the cases cited by petitioner in support of petitioner's argument with respect to the duty of care owed to passengers, we find that these cases are completely inapplicable.

The case of *Gore* v. *D. L. & W. Railroad Company*, 89 N. J. Law 224 (br. pp. 12-13), was distinguished by the Circuit Court at page 651 of its opinion and the Circuit Court indicated that the case was decided upon the fact

that the plaintiff was forced to get off at a dist
the proper place *in the night and without lights.* nce from
was also distinguished by the New Jersey Supr This case
in the case of *Hansbury* v. *Hudson & Manhatta* me Court
Company, 124 N. J. Law. 502, *supra.* *Railroad*

The case of *Hanson* v. *N. J. Street Railway* *Company,*
64 N. J. Law 686 (br. p. 13) considers a case of ering of a railroad car. ercrowd-

The quotation from the case of *Barney* v. *H* *udson &*
M. R. Co., 105 N. J. Law 274 (br. p. 14), decid d by the
Supreme Court of New Jersey, must be confin d to the
facts of that case which were as follows as taken from the
opinion:

> "When the train started she lost her ba
> grabbed the jaub of the open intercomm ance and
> door. 'Just then' the conductor came th nicating
> doorway from the car ahead and 'slammed ough the
> on plaintiff's finger, inflicting the injury fr the door
> suit was brought." m which

The last mentioned case was not an appliance case and
was decided solely because of the negligent acts o the con-
ductor, as a full reading of the opinion discloses.

The case of *Scott* v. *Bergen,* 63 N. J. Law 4 , (br. p.
14), decided by the Supreme Court of New Jer y was a
case where a trolley car gave a sudden lurch for yard and
a passenger lost her balance. The case is not pplicable
and in any event the case has not been follow d by the
Court of Errors and Appeals of the State of New Jersey.

See: *Faul* v. *North Jersey Street Railway Co.* 70 N. J.
Law 795, discussed *infra.*

The case of *Wall* v. *G. & R. Wood Inc.,* 11 N. J. L.
442, is a case where a bus stopped and plaintiff spoke to
the bus driver as he was getting off. The bus th n gave a
sudden jerk and the bus driver stated to the plai tiff "my
foot must have slipped, and I am sorry."

It is respectfully submitted that none of these cases are in any wise applicable to the facts in the case at bar and do not in any wise detract from or alter the rule set forth in the New Jersey cases cited by the Circuit Court in its opinion.

The other points raised by petitioner.

1. *Res Ipsa Loquitur.* Plaintiff abandoned this claim at the trial by failing to object to the Court submitting the case to the jury solely on the question of the manner in which the baggage rack was constructed. Nevertheless petitioner now seeks to inject the doctrine of *res ipsa loquitur* into this case and, in support thereof, cites the cases of *Mumma* v. *Eastern & A. R. Railroad Company,* 73 N. J. Law 653; *Rapp* v. *Butler,* 103 N. J. Law 512. These cases have no application, since the doctrine of *res ipsa loquitur* does not apply to a case such as this, as we hereinafter show.

The authorities are clear that the doctrine of *res ipsa loquitur* does not apply unless it is shown that the thing that caused the accident: the briefcase, was under the exclusive control of the defendant, and, unless the circumstances of the accident, unexplained, identifies the defendant as the sole negligent party.

See: *Conover* v. *D. L. & W. Railroad Co.,* 92 N. J. Law 602 (Court of Errors & Appeals);
Watson v. *Penn-Reading Seashore Lines,* 122 N. J. Law 614 (Supreme Court, July 1939);
Whitcher v. *Board of Education,* 233 App. Div. 184.

The case of *Watson* v. *Pennsylvania-Reading Seashore Lines,* 122 N. J. L. 614, *supra,* is the most recent decision of a New Jersey Appellate Court on this question. In that case, plaintiff was a passenger on a train. He occupied a

seat immediately next to the window, which was open. He claimed that a small piece of stone came through the open window and struck his left eye. The stone was identified as a trap rock which "is used in the manufacture of concrete asphalt roads and railroad ballast." The Appellate Court of New Jersey, in sustaining a judgment of nonsuit and in holding that *res ipsa loquitur* did not apply, stated as follows:

> "It is contended that the nonsuit was erroneous; that proof of the facts above set forth were sufficient under the doctrine of *res ipsa loquitur* to raise an inference of negligence which the defendant was bound to explain or negative. Reliance is placed upon cases of which Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. Rep. 645; Mumma v. Easton & A. R. Co., 73 N. J. L. 653, 65 Atl. Rep. 208, are typical.
>
> "But we are unable to agree that the occurrence in question affords *prima facie* evidence that there was want of the high degree of care incumbent upon common carriers. In cases where the doctrine of *res ipsa loquitur* applies it is an essential that the agency causing the mischief be under the control of the party charged with liability. Such is not the case here. There is no proof that the small stone which caused this most unfortunate injury was part of the road ballast or that it came from the roadbed at all. It might quite conceivably have been thrown by a mischievous person. On this important element of the case the court was right in not leaving the matter to speculation."

The rule is aptly and tersely stated by the New York Appellate Division of the Third Department in the case of *Whitcher* v. *Board of Education*, 233 App. Div. 184, *supra*, wherein Van Kirk, J., stated as follows (pp. 184-185):

> "It was prejudicial error to introduce the doctrine of *res ipsa loquitur*. That doctrine does not apply to this case. The circumstances of the accident

and the injury do not identify the wrong
(Hardie v. Boland Co., 205 N. Y. 336.) They doer.
plained, do not identify this defendant as the unex-
negligent party (Plumb v. Richmond Light and solely
Co., 195 App. Div. 254; aff'd 233 N. Y. 285). R. R.
'The doctrine of *res ipsa loquitur*, although it * * *
vides a substitute for direct proof of negli t pro-
where plaintiff is unable to point out the specifigence
of negligence which caused his injury, is a rific act
necessity to be invoked only when, under the ciule of
stances involved, direct evidence is absent andcum-
readily available. * * * Hence, the presumptiod not
inference arising from the doctrine cannot be avon or
of, or is overcome, where plaintiff has full knowvailed
and testifies as to the specific act of negligence vledge
is the cause of the injury complained of.' (45 which
1206; Plumb v. Richmond Light & R. R. Co, C. J.
N. Y. 285.)" ., 233

As in the *Whitcher* case, *supra*, plaintiff gave fu
timony as to how the accident occurred. The circumsll tes-
of the accident, unexplained, did not identify defendtances
the solely negligent party. The last mentioned case ant as
proved by the Court of Appeals of the State of New is ap-
as sound law in *Bressler* v. *New York Rapid Transit* & York
ration, 270 N. Y. 409. *Corpo-*

The cases of *Rapp* v. *Butler*, 103 N. J. Law 51
Mumma v. *Eastern N. A. R. Co.*, 73 N. J. Law 653 2, and
pp. 7, 11, 12), dealing with the question of *res ipsa lo* (brief,
are clearly inapplicable. The *Rapp* case was decided *quitur*
Supreme Court of New Jersey. In that case, a whee by the
off a bus, and plaintiff, a passenger in the bus, was in l came
The accident was caused by part of the equipment of njured.
dislodging itself. It was not caused by a briefcase the bus
from a rack after being placed there by a fellow pas falling
That case would be applicable if the baggage rack itssenger.
and hit the plaintiff but is not applicable under the self fell
our case. The *Mumma* case was a case where a facts of
locomotive emitted steam which frightened a horse ailroad
on the

bridge overhead. Concededly, there the steam was caused by the railroad.

The plaintiff also cites the case of *Bressler* v. *New York Rapid Transit Corporation*, 277 N. Y. 200. This case is not a New Jersey case, and is inapplicable because in that case the plaintiff was injured *by shattered glass from the train window*, and, as a reading of the record shows, there was no proof in plaintiff's case as to how the glass was broken. The New York Court of Appeals held, that, since plaintiff was hurt by a portion of defendants equipment, she could rely on the doctrine of *res ipsa loquitur*. That is not so in the case at bar. Plaintiff was not hurt by a portion of the equipment but by a briefcase that concededly was not under the control of defendant. However, compare that case with the decision of the New Jersey court in the case of *Watson* v. *Pennsylvania-Reading Seashore Lines*, 122 N. J. L. 614, *supra*, wherein the New Jersey Appellate Court refused to apply the doctrine in a case where a passenger was injured, not by part of the equipment of the conveyance, such as glass, etc., but by a piece of stone which came in through an open window.

2. *The swaying of the bus.* The Circuit Court, in its opinion, further pointed out that evidence of the swaying of the bus, which petitioner urges here, was completely immaterial. This is in accord with the New Jersey and general law on this subject.

See: *Faul* v. *North Jersey St. R. Co.*, 70 N. J. Law 795, 59 Atl. 148;
Pascell v. *North Jersey St. R. Co.*, 75 N. J. Law 836, 69 Atl. 171.

In the case of *Faul* v. *North Jersey St. R. Co.*, *supra*, plaintiff testified that he was thrown off the platform of defendant's trolley car on which he was riding as a passenger when "the car took a jolt." Other testimony in the case showed that the jolt which took place was caused by an

ordinary resumption of speed following the slowing down of the trolley car to avoid a collision with another vehicle. The court held, as a matter of law, that such jolts even though they cause injury, do not constitute negligence.

The Court of Errors and Appeals, in distinguishing the case of *Consolidated Traction* v. *Thalheimer*, 59 N. J. Law 474, on which the Court relied in deciding the case of *Scott* v. *Bergen County Traction Co.*, 63 N. J. L. 407, cited at page 14 of petitioner's brief, said:

> "The only decision of this Court which it may be well to distinguish from the case in hand is that of Consolidated Traction Co. v. Thalheimer, 59 N. J. Law 474, 37 Atl. 132. In that case the passenger, who was thrown off the street car, in the act of alighting, had notified the conductor of her desire to get off on a certain street, designated by her, and, after the conductor had called out the name of that street, had arisen and gone to the rear door in preparation of alighting. This Court held that under those circumstances, the jerk of the car justified an inference of some breach of duty owned to her by the carrier. Manifestly, the conduct of the company's agent was an invitation to alight, and was calculated to put the passenger off her guard at the very time she had a right to expect the car to become stationery. No such fact appears in the case at bar. That case is readily distinguishable from the present by the above circumstantial statement. The two cases rest upon different principles of classification."

In the instant case, as in *Faul* v. *North Jersey St. R. Co.*, *supra*, defendant's bus driver had not by any conduct on his part put plaintiff off her guard. On the contrary, he did not know of the existence of any condition (to wit: the placing of the bag in the rack) which would cause him to drive his bus in other than the usual manner. In the absence of such knowledge defendant's bus driver cannot be held responsible for the existence of a condition known to plaintiff but not known to the driver. *Meelheim* v. *Public*

Service, 121 N. J. Law, 163, 1 Atl. 2d, 418. There is nothing in the record to show that the joggling or swerving described by plaintiff was other than that usually experienced by passengers riding on busses, which is apparent from the fact that neither plaintiff nor anyone else on the bus saw fit to complain of it to the bus driver, and from the fact that neither plaintiff nor any other passenger on the bus was lurched from her seat. It is clear, therefore, that for such incidental joggling and swerving the defendant is not liable.

Burr v. *Penn. R. R. Co.,* 64 N. J. Law 30, 44 Atl. 845;

Corkhill v. *Camden,* 69 N. J. Law 97, 54 Atl. 522;

Rochat v. *North Hudson Co. Ry. Co.,* 49 N. J. Law 445, 9 Atl. 688;

Graf v. *West Jersey & S. R. Co.* (N. J. Supr. Ct., not officially reported) 62 Atl. 333;

Griggs v. *Erie R. R. Co.,* 71 Fed. 2d, 966 (C. C. A. N. J.).

In *Griggs* v. *Erie R. R., supra,* the Circuit Court of Appeals of New Jersey, in an action by a passenger for injuries sustained by reason of alleged lurching, said:

> "So far as this question has come before the American Courts, it has been held with practical unanimity that a railroad company is not liable for injury to a passenger on a fast train by lurching of the train due to sharp curves in the track caused by the configuration of the country, if the track is well constructed and the train properly operated under the circumstances of the case, as the risk of such injury is an incident of travel assumed by the passenger."

It is interesting to note that this rule has been applied in cases, in jurisdictions other than New Jersey, where passengers were injured when a satchel in an overhead baggage rack was dislodged by the movement of the vehicle.

Wade v. *North Coast,* 165 Wash. 418, 5 Pac. 2d, 985;
Whiting v. *N. Y. C. & H. R. R. Co.,* 97 App. Div. 11, 89 N. Y. Supp. 584.

In the portion of Point II of petitioner's brief, petitioner again makes reference to the court's charge. But the question of the court's charge is completely immaterial. The sole question presented was whether or not the plaintiff had submitted sufficient proof under the New Jersey law to warrant the submission of the case to the jury. Under the New Jersey law, the plaintiff failed to prove a case on the sole issue presented and which petitioner's trial attorney agreed was the sole issue litigated.

In petitioner's last point, petitioner has cited a number of Federal cases on the degree of care of carriers. These Federal cases are not applicable since this case must be determined by New Jersey law. At best, they state general rules of law in general negligence cases and even in such cases it is significant to note that the rule in New Jersey is not the highest degree of care but a high degree of care, and, even that rule is not applicable in New Jersey in appliance cases, as we have heretofore shown.

The case of *Spokane & Inland Empire Railroad Co.* v. *U. S.,* 241 U. S. 344, is cited by petitioner at page 17 of her brief. Aside from the fact that this case is inapplicable since it does not consider New Jersey law, the case generally has no application. That case was not a negligence case. The quotation, taken apart from the case itself, results in an unfair presentation. The government brought an action to recover penalties from the railroad for violation of the Safety Appliance Act, passed by Congress; the violation consisting of hauling, in interstate commerce, twelve cars not equipped with hand-holds or grappling irons, as required by the act, and three cars not equipped with automatic couplers. The railroad offered testimony

to show that the holds or grappling irons on the car were sufficient to accomplish the purposes required to be accomplished by the provisions of the Safety Appliance Act. The court merely held that without the aid of expert testimony the jury could determine whether the statute had been complied with. A standard had been fixed by the statute. In the case at bar there was nothing for the jury to compare. The expert testimony offered in the *Spokane & Inland* case, *supra*, to prove something other than that required by statute was clearly inadmissible. The New Jersey law has been firmly fixed that a departure from standard must be shown in cases such as that at bar before negligence can be inferred.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari should be denied.

Dated, December 4th, 1940.

Respectfully submitted,

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Attorneys for Defendant.

JAMES S. HAYS,
of Counsel.